

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71069 / December 12, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3737 / December 12, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30829 / December 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3- 15644

In the Matter of

Mark M. Wayne,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTIONS 203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”) against Mark M. Wayne (“Wayne” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting

Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

Summary

1. This matter involves violations of the custody, compliance, and books and records provisions of the Advisers Act by Freedom One Investment Advisors, Inc. (“Freedom One”), a formerly registered investment adviser, which were willfully aided and abetted and caused by Wayne, its former President, Chief Executive Officer (“CEO”), and Chief Compliance Officer (“CCO”). From 2008 through 2010, Freedom One had custody of client assets held in two omnibus accounts (the “IRA Accounts” and the “Managed Accounts”) and was therefore required to comply with Section 206(4) of the Advisers Act and Rule 206(4)-2 promulgated thereunder (the “Custody Rule”).² For all three years, Freedom One violated the Custody Rule because it took no action to determine whether the independent public accountants it retained to conduct annual surprise exams to verify the assets over which it had custody performed those exams. For 2008, Freedom One engaged a national accounting firm (“Accounting Firm 1”) to perform a surprise exam, but Accounting Firm 1 did not complete the exam. For 2009 and 2010, Freedom One engaged another national accounting firm (“Accounting Firm 2”) to conduct surprise exams, but the exams were insufficient because Freedom One told Accounting Firm 2 that only the IRA Accounts were subject to the exams and thus the exams did not include the Managed Accounts.

2. Freedom One and Wayne also violated the Custody Rule requirement regarding client account statements. From 2008 through 2010, an affiliate of Freedom One, Freedom One Retirement Services, Inc. (“FORS”), which was not a qualified custodian, provided quarterly account statements to clients with IRA Accounts and Managed Accounts. Consequently, for 2008 and 2009, Freedom One violated the prior Custody Rule requirement that a qualified custodian provide statements to clients in the absence of a surprise exam. Furthermore, for 2010, when the current Custody Rule became effective, Freedom One was required to have a reasonable basis for believing that a qualified custodian was sending quarterly statements to clients regardless of whether a surprise exam was completed, but it failed to do so.

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

² On December 31, 2009, the Commission revised Rule 206(4)-2. Freedom One’s conduct for 2008 and 2009 was governed by the custody rule in effect before the December 31, 2009 amendments. See *Custody of Funds or Securities of Clients by Investment Advisers*, Release No. IA-2176 (Sept. 25, 2003). Freedom One’s conduct for 2010 was governed under the revised custody rule, which became effective on March 12, 2010. See *Custody of Funds or Securities of Clients by Investment Advisers*, Release No. IA-2968 (Dec. 30, 2009).

3. Freedom One and Wayne also failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules promulgated thereunder, in violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder (the “Compliance Rule”). From October 2008 through March 2011, Freedom One did not have policies and procedures reasonably designed to prevent violations of the Custody Rule.

4. Finally, Freedom One and Wayne failed to maintain accurate books and records, in violation of Section 204 of the Advisers Act and Rule 204-2 promulgated thereunder. From January 2009 through July 2010, certain Freedom One transactions were not properly reflected in its books and records.

Respondent

5. **Mark M. Wayne**, age 49, of Clarkston, Michigan, co-founded Freedom One in 1995 and was the sole owner of Freedom One Financial Group, LLC (“FOFG”), the 66% owner of Freedom One and FORS until December 31, 2012, when FOFG was acquired by a dually-registered broker-dealer and investment adviser registered with the Commission. Wayne was Freedom One’s CEO, President, and a Director, and since October 2008, he was also its CCO. From 2009 through 2011, Wayne was also associated with a registered broker-dealer.

Other Relevant Entities

6. **Freedom One Investment Advisors, Inc.**, was a Michigan corporation headquartered in Clarkston, Michigan and registered with the Commission as an investment adviser from December 1995 until April 2, 2013, when it filed a Form ADV-W to withdraw its registration with the Commission.

7. **Freedom One Retirement Services, LLC**, was a Michigan and North Carolina limited liability company headquartered in Clarkston, Michigan. FORS provided retirement plan services, including record keeping services, to Freedom One. FORS was an affiliate of Freedom One.

Background

8. From 2008 through 2010, Freedom One offered discretionary and non-discretionary investment management services to: (1) qualified retirement plans that were subject to the Employee Retirement Income Security Act of 1974, as amended (“Qualified Plans”); (2) participants of the Qualified Plans; (3) individuals with IRA accounts (“IRA Accounts”); and (4) individuals with personal taxable accounts (“Managed Accounts”). During the relevant period, Freedom One managed approximately \$625 million in assets, approximately \$69 million of which were held in the IRA Accounts (approximately 1,456 accounts) and Managed Accounts (approximately 66 accounts).

Freedom One Failed to Comply with the Custody Rule

9. The Custody Rule – Rule 206(4)-2 under the Advisers Act – requires registered investment advisers with custody of client funds or securities to implement certain controls designed to protect those client assets from loss, misappropriation, misuse, or the adviser’s insolvency. Before the amendment of Rule 206(4)-2, the rule required these advisers to have a reasonable basis for believing that a qualified custodian, such as a bank or broker-dealer, was sending quarterly account statements to each of the clients for which it maintained funds or securities, or to send the quarterly account statements itself and obtain an annual surprise examination by an independent public accountant to verify all of the client assets. The amended rule generally requires these advisers to have a reasonable basis for believing that a qualified custodian is sending quarterly statements to clients and to be subject to an annual surprise examination.

10. From 2008 through 2010, funds and securities for the IRA Accounts and Managed Accounts were held in one omnibus account at a broker-dealer registered with the Commission (“Custodian 1”). A third-party custodian and trustee (“Custodian 2”) instructed Custodian 1 as to which trades to execute, based on instructions it received from Freedom One. Custodian 2 maintained two separate omnibus accounts – one for the IRA Accounts and one for the Managed Accounts.

11. From 2008 through 2010, FORS maintained the records for Custodian 2’s omnibus accounts on a participant level (i.e. keeping track of how the assets in the IRA and Managed Accounts broke down by client) and directed Custodian 2 to make distributions. Since FORS’ responsibilities gave it the authority to obtain possession of clients’ funds and securities held in Custodian 2’s omnibus accounts, and FORS was an affiliate of Freedom One, Freedom One was deemed to have custody of the assets contained in Custodian 2’s omnibus accounts.

12. From 2008 through 2010, Freedom One’s clients that had assets in the IRA Accounts and Managed Accounts did not receive quarterly account statements from a qualified custodian. Instead, Custodian 2 paid FORS, which was not a qualified custodian, to prepare and send those statements.

Freedom One Failed to Have a Surprise Exam Completed for 2008

13. On behalf of FOFG, Freedom One’s CCO at the time executed an engagement letter with Accounting Firm 1 dated November 5, 2007 covering Freedom One’s 2008 surprise exam. According to the engagement letter, Accounting Firm 1 was to perform an “annual surprise audit” of a “previously tested product that [Freedom One has] developed [i.e. the IRA Accounts]...” Although the letter did not refer to the Custody Rule itself, it provided surprise exam guidance directly from it, stating:

An independent public accountant verifies all of those funds and securities by actual examination at least once during each calendar year...and files a certificate on Form ADV-E (17 CFR 279.8) with the Commission within 30 days after the

completion of the examination, stating that it has examined the funds and securities and describing the nature and extent of the examination.

14. The engagement letter referenced a November 2006 email from the CCO to Accounting Firm 1, which stated, “The following is some of the regulatory language spelling out [sic] the requirement... **§ 275.206(4)-2 Custody of funds or securities of clients by investment advisers.**” The email also includes the entire text of the prior Custody Rule.

15. During 2008, Accounting Firm 1 conducted some field work for the 2008 surprise exam, with a surprise exam date of August 31, 2008.

16. As CEO, principal and CCO of Freedom One, Wayne knew that Freedom One was required to comply with the Custody Rule. In October 2008, Wayne designated himself as Freedom One’s CCO.³ At the time, he had no formal training in investment adviser compliance. In addition, Wayne had only a general understanding of what the Custody Rule required Freedom One to do - that Freedom One needed an accountant to perform a surprise exam. After becoming CCO, he did not adequately familiarize himself with the Custody Rule or surprise exam requirements, or attend any formal investment adviser compliance training. Wayne did not know that the accountant Freedom One engaged to conduct the surprise exam was required to file a Form ADV-E with the Commission.

17. Accounting Firm 1 never completed the 2008 exam procedures, never prepared the required surprise exam report, and never filed a Form ADV-E with the Commission.

18. When Wayne took over as CCO, he knew that Accounting Firm 1 had been engaged to conduct Freedom One’s 2008 exam, but took no action to determine whether Accounting Firm 1 actually completed it. Wayne did not receive a copy of the 2008 surprise exam report, and did not specifically ask Accounting Firm 1 for one until 2009. Furthermore, Wayne did not receive a copy of a filed Form ADV-E or Exam Certificate. These factors indicated that Accounting Firm 1 did not complete the 2008 exam.

19. In July 2010, Freedom One learned that Accounting Firm 1 had not issued a report for the 2008 exam. By mid-April 2011, Freedom One knew that Accounting Firm 1 did not complete the exam or file a Form ADV-E with the Commission.

³ On December 18, 2006, Freedom One’s former CCO engaged Accounting Firm 1 to conduct a first surprise exam. During 2006 and 2007, Accounting Firm 1 conducted some field work for that exam, with a surprise exam date of December 31, 2006, but, like the 2008 exam, never completed the exam by filing a Form ADV-E, which at the time required a paper filing, rather than an electronic filing. Although during 2007, Accounting Firm 1 exchanged draft Forms ADV-E with the former CCO, by the spring of 2011, Freedom One knew that Accounting Firm 1 did not complete either exam. Freedom One did not engage an accountant to conduct a 2007 surprise exam.

**Freedom One Failed to Have Surprise Exams of
Its Managed Accounts Performed for 2009 and 2010**

20. Wayne delegated responsibility for the 2009 surprise exam to a Freedom One employee, who worked in Freedom One's recordkeeping and administration department, and who did not have any training or experience in securities law or investment adviser compliance ("Recordkeeping Employee").

21. In the spring of 2009, Recordkeeping Employee began discussions with Accounting Firm 2 about the 2009 surprise exam. Accounting Firm 2 had no prior experience with Freedom One's IRA Accounts and Managed Accounts.

22. Freedom One counsel defined the scope of the surprise exam in a December 7, 2009 email to Accounting Firm 2, with a copy to Recordkeeping Employee, stating that "the only accounts subject to the surprise audit are the Freedom One IRA accounts which are held at [Custodian 2]." Recordkeeping Employee was the only Freedom One employee copied on this email. At the time, Recordkeeping Employee did not know which accounts Freedom One had custody over.

23. From January through December 2010, Accounting Firm 2 conducted the 2009 and 2010 surprise exams. These exams did not comply with the requirements of the Custody Rule because Accounting Firm 2 examined only the IRA Accounts, and not the Managed Accounts.⁴

24. On February 7, 2011, Accounting Firm 2 filed Forms ADV-E and surprise exam reports with the Commission for 2009 and 2010.

25. Wayne knew that Accounting Firm 2 had been engaged to conduct surprise exams for 2009 and 2010, but had no direct involvement in the exams other than delegating oversight responsibility of them to Recordkeeping Employee.

**Freedom One Failed to Adopt and Implement Sufficient
Written Compliance Policies and Procedures Regarding Custody**

26. The Compliance Rule – Rule 206(4)-7 under the Advisers Act – requires investment advisers registered with the Commission to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules.

27. From October 2008 through March 2011, Freedom One's policies and procedures were not reasonably designed to prevent violations of the Custody Rule.

⁴ Freedom One engaged an accounting firm to validate transaction activity in the Managed Accounts for September 1, 2008 through June 30, 2011. The accounting firm found no exceptions for transactional activity occurring in the Managed Accounts.

28. On September 16, 2004, Freedom One adopted policies and procedures regarding custody and possession of clients' funds or securities. The relevant portion of Freedom One's compliance manual containing these policies and procedures was not updated in 2008 to properly identify the firm's custody over assets in the IRA and Managed Accounts. Thus, the firm's written policies and procedures did not meet the requirements of the Custody Rule.

29. In July 2010, Freedom One revised these policies and procedures. The relevant portion of Freedom One's revised compliance manual misstated that it only had custody over the IRA Accounts, and it did not contain policies and procedures reasonably designed to prevent violations of the Custody Rule.

30. In August 2011, Freedom One revised its compliance manual to state that if it is deemed to have custody of client funds or securities, it will comply with the SEC's Current Custody Rule and have a surprise exam conducted. It also revised its compliance manual to include procedures regarding the receipt of cash and checks, billing, qualified custodians, and account statements.

31. From October 2008 through March 2011, Wayne was Freedom One's CCO and ultimately approved Freedom One's compliance manuals in effect at the time, which were not reasonably designed to prevent violations of the Advisers Act as they related to custody over Freedom One's assets.

Freedom One Failed to Keep Accurate Books and Records

32. Section 204 of the Advisers Act and Rule 204-2 promulgated thereunder require that registered investment advisers make and keep certain books and records. Rule 204-2(a) sets forth certain categories of books and records that registered investment advisers are required to "make and keep true, accurate and current" with respect to their investment advisory business.

33. From January 1, 2009 through July 30, 2010, Freedom One failed to maintain accurate books and records. During that time, Freedom One's books and records were maintained by its Controller, who did not possess the skills necessary to properly perform her job. The Controller maintained Freedom One and FORS' accounting and financial records as separate departments within one company on an accounting system. Generally, intercompany accounts were used to reflect the sharing of employee and office expenses between Freedom One and FORS, as well as other transactions. However, due to the Controller's inexperience and shortcomings in the accounting software used by the firm, not all of Freedom One's transactions were properly reflected in Freedom One's accounts.

34. For example, Freedom One failed to properly record transactions in connection with a \$52,500 loan it made to Karmichael Properties, LLC ("Karmichael"), a Freedom One affiliate that owns the building where Freedom One had its offices. On September 10, 2009, Freedom One made the loan and recorded as a debit to FORS' intercompany account with Karmichael and a credit to Freedom One's checking account. On October 2, Karmichael paid back the loan to FORS and the transaction was recorded as a credit to FORS' intercompany account and

a debit to FORS' checking account. No entry was made on Freedom One's books for this closing transaction. The loan should not have been recorded on FORS' books. The transaction should have been recorded in Freedom One's general ledger as a debit to an intercompany account with Karmichael and a credit to Freedom One's checking account. The entry should have been reversed when Karmichael paid back the loan. In addition, Karmichael should have paid back the loan to Freedom One, not FORS.

35. In addition, on October 1, 2009, \$143,940.17 was transferred from a FORS money market account to a Freedom One payroll account. A number of other related transactions also occurred. However, no intercompany transactions were recorded to reflect this movement of money which caused the intercompany general ledger account to be misstated on Freedom One's books and records. The transactions were incorrectly balanced across Freedom One and FORS' records as a debit to a Freedom One payroll account and a credit to a FORS money market account. The transaction should have been recorded on Freedom One's books as a debit to a Freedom One payroll account and a credit to an intercompany account.

36. Finally, every month, FORS used a brokerage account to collect advisory income from most of Freedom One's advisory clients. The advisory fees were withdrawn from Freedom One's advisory client accounts at Custodian 1 and then deposited into a Custodian 1 brokerage account in the name of FORS. These fees were then aggregated and transferred to a bank account in the name of Freedom One. There were no journal entries to indicate an intercompany balance while the advisory fees were in the FORS brokerage account. In fact, the FORS brokerage account was not reflected on FORS' chart of accounts or on FORS or Freedom One's general ledger. For example, on January 6, 2009, Freedom One deposited \$210,475.38 into a checking account. This money came from the FORS brokerage account. There was no credit entered on the Freedom One general ledger to balance the debit associated with this deposit into the checking account.

37. Wayne, as Freedom One's CEO and primary control person, knew that Freedom One was required to maintain accurate books and records. He appointed a Controller who lacked the necessary skills and did not provide her with adequate support and training to accurately maintain Freedom One's books and records.

Violations

38. As a result of the conduct described above, Wayne willfully aided and abetted and caused Freedom One's violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 promulgated thereunder.

39. As a result of the conduct described above, Wayne willfully aided and abetted and caused Freedom One's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder.

40. As a result of the conduct described above, Wayne willfully aided and abetted and caused Freedom One's violations of Section 204 of the Advisers Act and Rule 204-2 promulgated thereunder.

Undertakings

41. In anticipation of the bar referenced in Sections IV.B. and IV.C, Respondent Wayne shall, before making any reapplication for association, complete thirty (30) hours of compliance training relating to the Advisers Act.

42. Certification of Compliance. Wayne shall certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Wayne agrees to provide such evidence. The certification and supporting material shall be submitted to Paul A. Montoya, Assistant Regional Director, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 900, Chicago Illinois 60604, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertaking.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Wayne's Offer.

Accordingly, pursuant to Section 15(b) of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Wayne cease and desist from committing or causing any violations and any future violations of Sections 204 and 206(4) of the Advisers Act and Rules 204-2, 206(4)-2, and 206(4)-7 promulgated thereunder.

B. Respondent Wayne be, and hereby is barred from acting as the chief compliance officer of any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission; and prohibited from serving or acting as the chief compliance officer for a registered investment company or for an affiliated person of an investment adviser, depositor of, or principal underwriter for, a registered investment company, with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Respondent Wayne, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as

the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent Wayne shall, within (10) days of the entry of this Order, pay a civil money penalty in the amount of \$40,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Wayne as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Paul Montoya, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 900, Chicago, IL 60604.

E. Respondent Wayne shall comply with the undertakings enumerated in Sections 41 and 42 above.

By the Commission.

Elizabeth M. Murphy
Secretary